

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM 1946

No.

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

**OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,**

Appellants,

v.

**WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively,
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of Pauline
Schrader, Deceased,**

Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellee, State Land Board of Oregon, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully moves this Court to dismiss the above entitled appeal or, in the alternative to affirm the judgment of the Supreme Court of the State of Oregon on the grounds that one of the federal questions sought to be reviewed was neither timely nor properly raised nor expressly passed upon by the courts

of the State of Oregon and further that this appeal does not present a substantial federal question.

STATEMENT

This is an appeal from a decision of the Supreme Court of Oregon modifying an Order of Escheat entered by the Circuit Court of Multnomah County, Oregon. The opinion of the Supreme Court of Oregon held that the heirs of an Oregon decedent, which heirs reside in the German Democratic Republic (East Germany or the Soviet Zone of Germany) were entitled to inherit the real property of the decedent, located in Oregon, under Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany, December 8, 1923, 44 Stat. 2132, T.S. No. 725 (effective October 14, 1925) amended June 3, 1935, 49 Stat. 3258, T.S. No. 897. The court further held that in so far as the provisions of the Treaty of 1923 did not provide for the inheritance of personal property of the decedent, located in Oregon, Section 111.070, Oregon Revised Statutes, Oregon's reciprocal inheritance statute, would apply.

ORS 111.070 is as follows:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take

real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

The Supreme Court of Oregon found that the East German heirs of the decedent had not made the necessary showing to bring themselves within the terms of ORS 111.070 and therefore the court affirmed the escheat of the personal property of the decedent.

Appellants contend on this appeal that ORS 111.070 is repugnant to Article I, § 8, Article I, § 10, and/or the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and that this statute is invalid as it conflicts with overriding federal law and policy.

The position of the Appellee State Land Board of Oregon is that inasmuch as Appellants did not raise

the issue in the courts of Oregon and the Supreme Court of Oregon did not decide the constitutionality of ORS 111.070 in light of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; such an issue was not timely or properly raised and may not be properly considered here.

The Appellants did raise and the Supreme Court of Oregon did decide the issue of whether ORS 111.070 was an unconstitutional attempt by the state to invade the exclusive power of the federal government to regulate the foreign relations of the United States. The Court decided that the statute was not an unconstitutional invasion of federal powers by the State of Oregon on the basis of this Court's decision in the case of *Clark v. Allen*, 331 U.S. 503 (1947). Therefore it is our contention that this appeal does not present a substantial federal question.

ARGUMENT

- 1. Failure to raise the federal constitutional question of due process and equal protection in the state courts precludes consideration of the question here.**

Appellants here, as one of their questions on appeal, seek to question the validity of ORS 111.070 as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States for the first time on this appeal without ever having presented the issue to the courts

of the State of Oregon. In an "unbroken line of precedent" the Supreme Court of the United States has held that where the question has not been raised in the state courts and has not actually been decided by the highest state court, here the Supreme Court of the State of Oregon, the question will not be entertained. *Beck v. Washington*, 369 U.S. 541 (1962); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *John v. Paullin et al.*, 231 U.S. 583 (1914).

In addition, the law of Oregon requires that constitutional questions be raised in the trial court before they may be considered upon appeal. *Ross v. State Land Board*, 241 Or. 442, 443, 406 P.2d 549 (1965); *State Highway Commission v. Helliwell*, 225 Or. 588, 358 P.2d 719 (1961); *Senger v. Vancouver-Portland Bus Co.*, 209 Or. 37, 298 P.2d 835, 304 P.2d 448, 62 A.L.R.2d 265 (1956); *The Alpha Corporation v. Multnomah County*, 182 Or. 671, 189 P.2d 988 (1948).

2. This appeal presents no substantial federal question not previously decided by this court.

As Appellants state in their Jurisdictional Statement, consideration of this appeal would necessitate a re-examination and invalidation of the long established and followed precedent of *Clark v. Allen*, 331 U.S. 503 (1947). The Supreme Court of the State of Oregon relied upon the Clark case almost totally in arriving at its decision in the present case.

The same portion of the same treaty was involved in the Clark case as is involved here, Article IV of the

Treaty of Friendship, Commerce and Consular Rights with Germany, December 8, 1923, 44 Stat. 2132, T.S. No. 725 (effective October 14, 1925) amended June 3, 1935, 49 Stat. 3258, T.S. No. 897, and the Clark case was followed to exactly the same result here.

Appellants' challenge to the statute here draws the same issue as in the Clark case in that the reciprocal inheritance statute of Oregon, ORS 111.070, is here contested as repugnant to Article I, § 8 and Article I, § 10, of the Constitution of the United States, as was the reciprocity statute of California in Clark v. Allen.

Summarizing, this Court in Clark v. Allen, 331 U.S. at 517, 518, found that the local laws of succession of property should govern unless the rights would be "affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements", which the Court found did not exist as to personal property under the Treaty of 1923. The Court recognized that the laws of reciprocity regarding succession to property might have an incidental or indirect effect in foreign countries but that such laws did not constitute negotiating with a foreign country by a state within the prohibition of Article I, § 10, of the Constitution of the United States.

Appellants seem to contend that changing conditions since the date of the decision of Clark v. Allen, *supra*, either rise to the stature of or have given rise to an overriding federal policy against such state reciprocity statutes relating to succession of property.

While the change of events may well precipitate a

change in federal policy, until and unless that policy is announced by the executive or legislative branch of the federal government there has in fact been no change in such policy. Appellants can point to no such announced change of policy or law.

Here the Treaty of 1923 as amended and as interpreted by this Court, is the policy of the federal government. The only change which has been enunciated is the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, October 29, 1954, 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956), which supersedes the Treaty of 1923 as to certain restricted geographical areas of Germany and this Treaty was found to be inapplicable to the present case by the Supreme Court of Oregon.

Thus there is no announced overriding federal policy which would impair the rights of the states to legislate regarding the testate or intestate succession to property within the respective states to which Appellants can refer.

This Court has previously dismissed two appeals presenting what Appellee believes to have been similar questions, *Ioannou v. New York*, 371 U.S. 30 (1962); *Re Braier's Estate*, 305 N.Y. 148, 111 N.E.2d 424, app. dismd. sub nom *Kalmane v. Green*, 346 U.S. 802 (1953), for lack of substantial federal questions.

CONCLUSION

For the foregoing reasons Appellee, State Land Board of Oregon, respectfully submits this appeal should be dismissed or in the alternative that the decision of the Supreme Court of Oregon be affirmed.

Respectfully submitted,

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